Nos. 03-892, 03-907

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

JOHN W. BANKS, II
Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SIGITAS J. BANAITAS
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

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BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., AARP, TRIAL LAWYERS FOR PUBLIC JUSTICE, PUBLIC ADVOCATES, INC. AND THE WESTERN CENTER ON LAW AND POVERTY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

All *amici* here, either organizationally or through their members, represent individuals under Federal fee shifting statutes, including Title VII of the Civil Rights Act of 1964, the Equal Pay Act, 42 U.S.C. §§ 1981 and 1983, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act and the Family and Medical Leave Act. The payment of attorneys' fees in such litigation is contingent in the sense that the defendant only pays fees if the plaintiff prevails, but the fee award is separate from judgment on the merits. This is unlike the situation in "ordinary" contingent fee cases, where fees are apportioned from the merits judgment, with lawyer and client each taking a share.

In fee shifting cases under civil rights statutes, the relief sought may be exclusively, or predominantly, injunctive. Indeed, the only money awarded in some cases may be the attorneys' fees themselves. If the plaintiffs in these or similar cases are required to pay taxes on fees that go to their lawyers, they will lose money by winning a lawsuit. Even the most meritorious civil rights claims will not be pursued, and the fundamental goal of fee shifting—encouraging citizens to act "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority," *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)—will be nullified. All *amici* share an interest in seeing that this does not occur.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

Amici also have an interest in the plaintiff's tax liability for fees received by lawyers under ordinary contingent fee agreements, because such agreements may provide the only vehicle for financing litigation on behalf of impecunious individuals, especially if fee shifting statutes are not available. Fuller statements of interest for all *amici* are included in the appendix to this brief.

STATEMENT

These consolidated cases both involve the tax treatment of fees paid to plaintiff's counsel in employment litigation undertaken under a contingent fee agreement. Contrary to the Solicitor General's assumption, however, there are significant differences between the two cases, requiring different modes of analysis.[2]

In No. 03-892, respondent Banks originally sued his employer under both Federal and state law. But by the time the case settled for $464,000 ($150,000 of which went to counsel), only the three Federal claims remained viable, arising under Title VII and 42 U.S.C. §§ 1981, 1983. *Banks v. Commissioner*, 345 F.3d 373, 379 (6th Cir. 2003). All three of these claims were subject to statutory fee shifting. *See* 42 U.S.C. § 2000e-5(k) (Title VII), and 42 U.S.C. § 1988 (§§ 1981, 1983).

In No. 03-907, in contrast, respondent Banaitis pursued two common law Oregon tort claims. *Banaitis v. Commissioner*, 340 F.3d 1074, 1077 (9th Cir. 2003). Such claims were not subject to fee shifting. The case ultimately settled for $8,728,559, of which $3,864,012 was paid to counsel. *Id.* at 1078.

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[2] As the Solicitor General notes, Brief for Petitioner at 15 n.3, neither case involves recoveries for "personal physical injuries or physical sickness," which are excluded from gross income under 26 U.S.C. § 104(a)(2).

Both the Sixth Circuit in *Banks* and the Ninth in *Banaitis* held that the fees received by counsel should not be treated as income to the plaintiff. Consequently, those fees were subject to taxation only as income to the lawyers. The two courts employed different rationales. The Ninth Circuit viewed state lien law as dispositive, as in *Cotnam v. Commissioner*, 263 F.2d 119 (5th Cir. 1959), and stressed that Oregon law was comparable to that in Alabama (as analyzed in *Cotnam*) in granting superior rights to lawyers. 340 F.3d at 1082-83. The Sixth Circuit rejected a "state-by-state" approach, instead likening Banks' lawyer to a "tenant in common of the orchard owner [who] must cultivate and care for and harvest the fruit of the entire tract." 345 F.3d at 384-85. The Sixth Circuit did not focus on the fee shifting statutes under which Banks' claims arose.

SUMMARY OF ARGUMENT

In both these cases, the taxpayer derived income from settlement of a lawsuit against his employer, and in both cases the underlying litigation featured a contingent fee agreement between the taxpayer and counsel. In *Banks*, however—unlike *Banaitis*—the settled claims arose under Federal fee shifting statutes. This distinction is crucial.

1. Whatever the proper result in ordinary contingent fee litigation, fees awarded by a court under a fee shifting statute (or paid as part of a settlement) are not income to the plaintiff. The "assignment of income" doctrine, developed in cases like *Lucas v. Earl*, 281 U.S. 111 (1930), and *Helvering v. Horst*, 311 U.S. 112 (1940), simply has no application to the statutory fee model, because statutory fees are not intended to liquidate a private debt owed by a plaintiff to counsel.

This Court has explained that a private plaintiff in a civil rights case acts "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402.

Resources are required for successful prosecutions by any attorney general, public or private, and Congress "enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief." *Id.* The "aim" of fee shifting is to encourage meritorious litigation by "enabl[ing] civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail." *Venegas v. Mitchell*, 495 U.S. 82, 86 (1990).

A statutory fee case, unlike ordinary contingent fee litigation, entails two distinct awards, separated temporally: (1) judgment on the merits, which may be declaratory or injunctive relief or damages from a jury, followed by (2) attorneys' fees awarded by the court. Judicial awards at "stage 2" are divorced from any private agreements between plaintiff and counsel, *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989), and are intended to produce "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984).

The difference between statutory fees and ordinary contingent fees is perhaps best illustrated by the eligibility of *pro bono* legal organizations for statutory fees at normal market rates, even though the plaintiff owes them nothing. *Id.* at 894. This makes it clear that statutory fees are not intended to discharge private obligations.

Statutory fees and ordinary contingent fees also differ in another crucial respect. Unlike ordinary contingent fees, which are some percentage of the merits recovery, it is not unusual for a statutory fee award to be larger than the merits judgment. *City of Riverside v. Rivera*, 477 U.S. 561 (1986). In such cases, if attorneys' fees are considered income to the plaintiff, the operation of the Alternative Minimum Tax will frequently result in a prevailing plaintiff's suffering a net financial loss. *See, e.g., Porter v. Director, Agency for International Development*, 293 F.Supp.2d 152 (D.D.C.

2003) (plaintiff who won a jury verdict of $30,000 plus a fee award could suffer a post-tax loss of nearly $50,000). The plaintiff in the worst posture is the one who seeks, and secures, purely injunctive relief; she receives no money herself but pays taxes on every dollar that her lawyer is awarded in fees.

A key objective of fee shifting, however, is to permit plaintiffs "to employ . . . lawyers *without cost* to themselves if they prevail." *Venegas v. Mitchell*, 495 U.S. at 86 (emphasis added). Including statutory fees in the plaintiff's income undermines this congressional goal and is not required by unyielding tax principles. The evils addressed by *Lucas v. Earl* and *Helvering v. Horst* are simply not present in the fee shifting context. In particular, this is not a situation in which a plaintiff is assigning his own income to counsel. On the contrary, the plaintiff himself has no statutory right to the fee award, even if he is a lawyer, since judicially ordered fees are intended only for retained counsel. *Kay v. Ehrler*, 499 U.S. 432 (1991). Nor is it a case of the defendant paying a private debt owed by plaintiff to counsel, since statutory fees are independent of private fee agreements. *Blum v. Stenson, supra; Blanchard v. Bergeron, supra.* Finally, this is not a situation in which an amount will go untaxed unless deemed income to the plaintiff. An award of attorneys' fees is without question income to counsel, and counsel pays taxes on it.

The taxpayer's employment claims in *Banks* arose under fee shifting statutes, but there was no judicial award of fees because the case settled. Had Banks gone to trial and recovered the same amounts—$314,000 from a jury verdict, followed by a fee award of $150,000—the fees would not properly be seen as income to him. The tax treatment should not be affected by the fortuity that these sums were recovered through settlement. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984). Otherwise, plaintiffs in fee shifting cases would

be compelled to litigate, rather than settle, simply to enjoy favorable tax treatment.

A judicial award of attorneys' fees under a fee shifting statute is not income to the plaintiff, and fees recovered through settlement should be treated the same way. The judgment of the court of appeals in *Banks* can be affirmed on this ground alone. *Amici* recognize that the issue of the proper tax treatment of statutory fees was not presented to the Court by the parties, but the Court may consider arguments only put forward by an *amicus*, *Teague v. Lane*, 489 U.S. 288, 300 (1989), and *amici* request that the Court consider doing so here.

2. In addition, and in the alternative, fees received by counsel in ordinary contingent fee cases should not be deemed the plaintiff's income, either. A lawyer retained on a contingent basis is in the same economic position as a joint venturer, "in effect a cotenant of the property represented by the plaintiff's claim." Richard Posner, *Economic Analysis of Law* (5th ed. 1998) at 625. See *Banks*, 345 F.3d at 384-85. A joint venture is a "partnership" under the Tax Code, 26 U.S.C. § 761(a), and partners are taxed only on their respective "share of partnership gross income." 26 U.S.C. § 61(a)(13).

Unlike a commissioned salesperson, a lawyer paid on a contingent fee basis—if successful—significantly enhances the value of the underlying property (*i.e.*, the plaintiff's claim). And unlike counsel paid on an hourly basis, a contingent fee lawyer assumes the risk that the venture may not succeed.

In short, a successful lawyer operating under a contingent fee agreement *both* enhances the value of property and assumes the risk that the property may not be profitable. In these respects, the lawyer is in the same economic position as the owner of the property, whether or not a formal co-tenancy relationship exists. Tax law should recognize this economic

reality and treat a contingent fee arrangement as a joint venture, in which the parties are taxed only on their respective shares of gross income. Both *Banaitis* and *Banks* can be affirmed on this basis.

ARGUMENT

I. ATTORNEYS' FEES RECEIVED BY COUNSEL IN STATUTORY FEE CASES ARE NOT INCOME TO THE PLAINTIFF

An ordinary contingent fee case is "contingent" because counsel is compensated only if the plaintiff prevails following trial or if the case settles; the lawyer takes a percentage of the jury award (or settlement). The archetypal case under a fee shifting statute is also contingent in the sense that counsel is not compensated unless the plaintiff prevails. But counsel's fee does not come from the plaintiff's recovery; rather, responsibility for payment of the fee is "shifted" to the defendant, and the amount is determined by the court in a separate proceeding after the plaintiff has prevailed on the merits.

A. The Private Attorney General

Statutory fee shifting is a relatively recent phenomenon. The first modern fee shifting provisions were contained in Titles II and VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000a-3(b) (Title II), 42 U.S.C. § 2000e-5(k) (Title VII). Twelve years later, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, broadened the sweep of statutory fee shifting to embrace a host of other civil rights laws.

This Court has said that the "aim" of the fee shifting provisions in Title VII and other statutes, such as 42 U.S.C. § 1988, is to encourage meritorious litigation by "enabl[ing] civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail." *Venegas v. Mitchell*, 495 U.S. at 86. In the first case construing the fee

provisions in the Civil Rights Act of 1964, the Court explained that a private plaintiff in a civil rights case acts "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402. Fee shifting is essential to this enterprise because,

> [i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest. . . . Congress therefore enacted the provision for counsel fees—not simply to penalize litigants . . . but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief . . . .

Id.

The Court has also construed 42 U.S.C. § 1988 in a number of cases and has said that "[t]he standards set forth [under § 1988] are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983). And the objective of § 1988 (and hence of any fee shifting statute) is to produce "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. at 893-94. In particular, statutory fees are not intended to liquidate any private debt that the plaintiff may owe counsel. *Venegas v. Mitchell*, 495 U.S. at 90 ("§ 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer").

B. The Tax Problem in Statutory Fee Cases

In fee shifting cases, the trial is concerned solely with the merits. If the plaintiff wins, due either to a jury verdict or a bench ruling, the district court later considers an application for attorneys' fees from plaintiff's counsel. In fact, the judgment on fees is so divorced from the merits—so

"ancillary"—that the absence of a decision on fees does not deprive the underlying merits judgment of finality for purposes of appeal. *See White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982).

There is no dispute that an award of statutory attorneys' fees is income to counsel and should be taxed accordingly. The Internal Revenue Service, however, views cases involving statutory fees in the same way it sees ordinary contingent fee cases, taking the position that *all* money paid by the defendant in a statutory fee case, including the fees themselves, is also income to the plaintiff. Hence the same fees are taxed as income to both plaintiff and counsel.

If fees were deductible in full for Federal income tax purposes, their treatment as income would be a moot point. But they are not. The IRS has successfully argued that fees should be treated as "miscellaneous itemized deductions," *see Biehl v. Commissioner*, 351 F.3d 982 (9th Cir. 2003), and under the regular income tax, such deductions are deductible only to the extent that their total exceeds two percent of adjusted gross income. 26 U.S.C. § 67. In addition, the regular income tax imposes a ceiling on miscellaneous itemized deductions. 26 U.S.C. § 68. Together, these two provisions serve to increase the nominal marginal tax rate by five percent (*e.g.*, a marginal rate of 39.6 percent effectively becomes 41.58 percent). *See* Laura Sager & Stephen Cohen, "How the Income Tax Undermines Civil Rights Law," 73 *S. Cal. L. Rev.* 1075, 1084-85 and n.52 (2000).[3]

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[3] Professor Cohen has filed an *amicus* brief here as an academic *pro se*, arguing that attorneys' fees should be considered unreimbursed employee business expenses under 26 U.S.C. § 62(a)(2)(A), rather than miscellaneous itemized deductions. Given this characterization, fees would be excluded from gross income under 26 C.F.R. § 1.62-2(c)(4) (2004). Professor Cohen proposes a simple and elegant solution to the problems associated with the taxation of attorneys' fees, and *amici* endorse his approach.

Even more egregious, the Alternative Minimum Tax (AMT), which taxpayers must compute and pay if it yields a higher tax levy than the regular income tax, does not allow any miscellaneous itemized deductions at all. 26 U.S.C. § 56(b)(1)(A)(i). That means that those prevailing plaintiffs who are subject to the AMT will owe taxes equal to either 26 or 28 percent of the court-ordered fee award. 26 U.S.C. § 55(b)(1)(A)(i). At a minimum, this will sharply cut into the recovery on the merits (which is also subject to taxation). *See* Sager & Cohen, *supra*, at 1077-78.

In ordinary contingent fee litigation, the fee can never be larger than the merits recovery, since counsel's fee is computed as a percentage of that amount. But in statutory fee cases, it is not unusual for a fee award to be larger than the merits judgment. *City of Riverside v. Rivera*, 477 U.S. 561.[4] And in cases where the amount of attorneys' fees exceeds the plaintiff's recovery, the taxes due on fees frequently will result in a net financial loss for the plaintiff. *See* Adam Liptak, "Tax Bill Exceeds Award to Officer in Sex Bias Case," *New York Times* (August 11, 2002) at A12 (recounting how a prevailing plaintiff, whose jury verdict of $3 million had been reduced to $300,000 and whose lawyers were awarded fees of $850,000, faced a net post-tax loss of $99,000).

In such cases, the plaintiff is financially worse off prevailing than losing. This is also true in cases where injunctive relief is the primary, or sole, remedy sought, as in a suit brought to enjoin use of selection devices that are not job-related but that fall more harshly on African Americans than on whites. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In similar

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[4] The phenomenon of attorneys' fees exceeding the merits recovery is especially likely under Title VII and the Americans with Disabilities Act, where damages are capped at $300,000 for even the largest employers under 42 U.S.C. § 1981a(b)(3), so larger jury verdicts are routinely reduced to $300,000.

fashion, there may be no pay loss in a case of sexual harassment, and the victimized woman may simply want the security of a judicial prohibition. And even if she also seeks damages, an injunction may still be the most potent remedy available against small employers (100 or fewer employees), where the damage ceiling is $50,000. 42 U.S.C. § 1981a(b)(3). Treating the fees awarded counsel as income to the plaintiff in such cases, and taxing the plaintiff on that sum, eviscerates the congressional objective of permitting plaintiffs "to employ . . . lawyers without cost to themselves if they prevail." *Venegas v. Mitchell*, 495 U.S. at 86. Indeed, such tax treatment would deter citizens from pursuing even the most meritorious civil rights claims.

C. The Assignment of Income Doctrine Does Not Apply to Statutory Fees

At the outset of his Summary of Argument, the Solicitor General makes a number of points that he believes apply to the ordinary contingent fee setting, but none of them are pertinent to statutory fees. For example, the Solicitor General says that "income is to be taxed to the person who earns it, even when it is paid at that person's direction to someone else," Brief for Petitioner at 11; that "when a debt owed by a taxpayer is satisfied by a direct payment from a third party to the taxpayer's creditor, the taxpayer receives 'income' in the amount of the discharged debt," *id.*; and that where a taxpayer "has 'divert[ed] the payment from himself to others as the means of procuring the satisfaction of his wants,' [he] is subject to tax on the diverted proceeds," *id.* *Amici* do not quarrel with these tenets, but they do not apply to judicial awards under a fee shifting statute.

1. *The Assignment of Income Doctrine*

The principles cited by the Solicitor General represent differing formulations of the anticipatory assignment of income doctrine, which the Court developed in the first

generation following the adoption of the Federal income tax to prevent taxpayers from escaping taxation through shell games. For example, in *Lucas v. Earl*, 281 U.S. 111 (1930), the Court declined to bless a scheme in which a taxpayer assigned 50 percent of his future salary to his wife in an effort to avoid paying taxes on the entire amount. *Id.* at 115 (rejecting an "arrangement by which the fruits are attributed to a different tree from that on which they grew").

Similarly, in *Helvering v. Horst*, 311 U.S. 112 (1940), the Court held that the taxpayer was liable for taxes due on interest from bonds that he held, even though he had clipped the interest coupons and given them to his son shortly before the maturity date. And in *Horst*, the Court noted that it had previously ruled, in another variation on the assignment of income theme, that "[i]f the taxpayer procures payment directly to his creditors of the items of interest or earnings due him * * * he does not escape taxation because he did not actually receive the money." *Id.* at 116. That is, "[i]f A owes B a debt, and C pays the debt on A's behalf, it is elementary that C's payment is income to A as well as to B." *Sinyard v. Commissioner*, 268 F.3d 756, 758 (9th Cir. 2001), *cert. denied*, 538 U.S. 904 (2002).

2. *The Inapplicability of the Doctrine to Statutory Fees*

The principles first enunciated in *Lucas v. Earl* and *Helvering v. Horst* do not apply to the statutory fee context. A defendant who pays a court-ordered fee award, for example, is not discharging a private debt owed by the plaintiff to counsel, since fees awarded by a court are divorced from any private understanding between plaintiff and her lawyer. Thus, even nonprofit organizations that provide legal services *pro bono* are entitled to fees if the plaintiff prevails. *Blum v. Stenson*, *supra* (Legal Aid Society of New York City entitled to fees).

In addition, the amount of the fee award has nothing to do with whatever private agreement plaintiff and counsel may (or may not) have. *See Blanchard v. Bergeron*, 489 U.S. at 93 ("[s]hould a [private] fee agreement provide less than a reasonable fee . . . the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee"); *Venegas v. Mitchell*, 495 U.S. at 90 ("§ 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer").

Rather than depending on a private arrangement, the fee award should be a sum "adequate to attract competent counsel, but which do[es] not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. at 893-94. In practice, this means that the award should be calibrated to reflect the lawyer's effort; *i.e.*, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. at 433. The Solicitor General says that the " 'source of the income' at issue" is a salient factor in determining who should be taxed, Brief for Petitioner at 12 (*quoting Horst*, 311 U.S. at 116), and *Hensley* makes it clear that the "source" of the fee award—in particular, its amount—is the lawyer's effort, not the plaintiff's.

In a statutory fee case, unlike ordinary contingent fee litigation, two distinct sums are generated. The first is the judgment on the merits. Then, in a separate proceeding, attorneys' fees are awarded by the court. Unlike ordinary contingent fee litigation, the plaintiff's lawyer has no claim under fee shifting laws to any portion of the judgment on the merits. By the same token, Congress did not envision that the plaintiff herself would retain the attorneys' fees awarded in the separate fee proceeding.

The difference between private contingent fee arrangements and statutory fee shifting is highlighted in *pro se* cases, where retained lawyers are absent. If the plaintiff in a common law tort action decides to represent herself rather than retain counsel on a contingent basis, and if she then prevails on the merits, she gets to keep the entire judgment, including the portion that might otherwise have gone to a lawyer. But in a case subject to a fee shifting law, a *pro se* plaintiff who prevails is entitled only to the merits judgment and is never eligible for a separate fee award. This is true even if the *pro se* plaintiff is a lawyer, since fees are awarded only to further the congressional goal of attracting retained counsel. *Kay v. Ehrler*, 499 U.S. 432.

This is not to suggest that lawyers have a property interest in fees under fee shifting laws. They do not. Hence the plaintiff in a statutory fee lawsuit (as in any other case) has the final say on all substantive matters. This is why the plaintiff (in the absence of a private agreement with counsel) is free to bargain away fees in exchange for greater relief on the merits. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 731-32 (1986). *Jeff D.*, however, deals with control of the litigation. If fees are ultimately awarded, however, they go to counsel; the plaintiff has no statutory claim on the money. *Kay v. Ehrler, supra.*

In *Helvering v. Horst*, the Court said that "[c]ommon understanding and experience are the touchstones for the interpretation of the revenue laws." 311 U.S. at 118. This sentiment may have been aspirational, but on any "common understanding," the plaintiff in a statutory fee case does not receive income through court-ordered fees.

D. Porter v. AID

Amici believe that only one court has squarely addressed the issue of the taxability of an award of attorneys' fees in the statutory fee context. In *Porter v. Director, Agency*

for International Development, 293 F.Supp.2d 152, the jury found that the plaintiff had twice been denied promotions because of retaliation in violation of Title VII, and awarded a total of $30,000 in damages. In a separate proceeding, the district court later awarded $253,987 in attorneys' fees. *See* No. 00-1954 (D.D.C.), Docket Entry No. 155 (December 12, 2003).

If the IRS' position prevails and both the damages and fees awarded in *Porter* are seen as income to the plaintiff, he would in all likelihood be subject to the Alternative Minimum Tax. And since the IRS views fees as "miscellaneous itemized deductions" which are not deductible under the AMT (and since the AMT has only two brackets—26 and 28 percent), the plaintiff will owe either 26 or 28 percent of $283,987 (the total of $253,987 in fees and $30,000 in damages). That is, he will owe either $73,837 (at 26 percent) or $79,516 (at 28 percent). But the plaintiff did not receive any of the fee award; his counsel did. The plaintiff received only $30,000 in damages, so his net loss will be $43,837 or $49,516. He would have been much better off financially if he had lost on the merits at trial. Such pyrrhic victories will frustrate the congressional goal of encouraging private citizens to vindicate civil rights.

The district court in *Porter* was plainly troubled by this prospect. And given Title VII's "make whole" imperative, the court was confident that it possessed authority—if necessary—to order that the fee award be "grossed up" to ameliorate any adverse tax consequences. 293 F.Supp.2d at 156.[5] The district court declined to order grossing up,

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[5] Other courts have agreed that they have authority under anti-discrimination statutes to enhance awards to mitigate adverse tax consequences. *See, e.g., Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (Title VII); *Jordan v. CCH, Inc.*, 230 F.Supp.2d 603, 617 (E.D. Pa. 2002) (Age Discrimination in Employment Act); *O'Neill v. Sears Roebuck & Co.*, 108 F.Supp.2d 443, 446-47 (E.D.

however, due to considerations of finality and also because of a belief that—in the end—the award of attorneys' fees would not be deemed income to the plaintiff. *Id.* Instead, the court "concluded that the best course is to do what [it] can to ensure that the attorneys' fee award never becomes a tax problem for Porter, by . . . explaining the nature of the award clearly, so that Porter or his tax adviser can refer to the explanation when preparing income tax returns, and so that the IRS can consider the explanation before attempting to impose a tax on Porter for the attorney's fee award." *Id.* at 157.

In its "explanation" for the IRS, the district court said that "[t]he plaintiff's attorney in a Title VII case performs a public interest role," and that Congress authorized fee shifting "because it recognized that incentives would be needed to bring lawyers into a controversial field, where recoveries might not otherwise warrant substantial fees, in order to vindicate newly enacted civil rights." *Id.* The court further explained that "[a]n award of attorneys' fees in a Title VII case is not a percentage, or a subset, or in any way a part of an award of compensatory damages or of an award of back pay, front pay, or pre-judgment interest given as equitable relief." *Id.* Rather, "[i]t is a separate award, separately provided by statute, and made by the court in a separate proceeding." *Id.*

For these reasons, "[t]he ownership issue that appears to have split the circuits on the taxability of contingent fees . . . is not germane to a statutory Title VII attorneys' fee, and neither is the assignment of income doctrine." *Id.* at 158. That is, "the *form* of an attorneys' fee award is that of an

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Pa. 2000) (ADEA); *EEOC v. Joe's Stone Crab, Inc.*, 15 F.Supp.2d 1368, 1380 (S.D. Fla. 1998) (Title VII); *Arneson v. Sullivan*, 958 F.Supp. 443, 447 (E.D. Mo. 1996) (Rehabilitation Act). *See also Blaney v. IAM*, 87 P.3d 757, 761-64 (S.Ct. Wash. 2004) (Washington Law Against Discrimination). *But see Dashnaw v. Pena*, 12 F.3d 1112 (D.C. Cir. 1994).

award made to the prevailing party, [but] in *substance* the award is to counsel." *Id.* (emphasis in original).

Porter is on appeal on the merits, *Porter v. Natsios*, No. 04-5061 (D.C. Cir.), so the plaintiff's tax liability has not yet been determined. But the case is instructive in illustrating the serious tax consequences that can befall a plaintiff who prevails in a Title VII case, as well as pointing to a way out of this dilemma. The solution proposed by the district court in *Porter*, and advocated in this *amicus* brief, harmonizes important tax rules with equally compelling principles of civil rights law.[6]

E. The Effect of Statutory Fee Shifting on Banks

The taxpayer in *Banks* settled his employment case through an arrangement in which the defendant paid $464,000, of which $314,000 went to Banks himself and $150,000 to his lawyer. At the time of settlement, Banks had three viable claims under three different statutes—Title VII, 42 U.S.C. § 1981 and 42 U.S.C. § 1983—and all three were subject to statutory fee shifting. 42 U.S.C. § 2000e-5(k) (Title VII), and 42 U.S.C. § 1988 (§§ 1981, 1983). It does not matter for tax purposes if fees are recovered by judicial order or through settlement.

In any case subject to fee shifting, settlement discussions invariably include the amount of fees at issue, since this is part of the defendant's exposure. Consequently, any

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[6] As the district court noted in *Porter*, 293 F.Supp.2d at 154, a legislative solution would be welcome, but to date none has been forthcoming. Most recently, the Senate in May 2004 passed S. 1637, the Jumpstart Our Business Strength (JOBS) bill, which includes a provision (§ 643) that permits "above the line" deductions of attorneys' fees awarded or paid in cases involving employment disputes, so that such fees would not be included in Adjusted Gross Income subject to taxation. The House bill, H.R. 4520, contains no such provision, and there has been no conference as of the filing of this brief.

settlement includes—either explicitly or (frequently) implicitly—a sum devoted to fees. In these circumstances, there should be no difference in the tax treatment accorded fees awarded by a court or received by counsel as part of a settlement.

This Court has repeatedly observed that congressional policy favors the amicable resolution of Title VII disputes, as opposed to resolution on the merits following contested litigation. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting "Congress' intention to promote conciliation rather than litigation in the Title VII context," and citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984)). This pro-settlement policy would be undermined if a Title VII plaintiff could secure favorable tax treatment of the fees paid to counsel only by going to trial. *See Porter v. AID*, 293 F.Supp.2d at 155-56 (if "[c]ivil rights plaintiffs who settle their claims but are obligated to pay their attorneys fees under contingency agreements are treated just like other civil litigants under the assignment of income doctrine . . . such a result [would be] in direct conflict with the underlying purpose of the fee shifting provisions applicable to civil rights litigation").

In any event, Congress has shown that it believes that sums received through settlement should be treated the same way, for tax purposes, as amounts recovered through resolution on the merits. *See, e.g.*, 26 U.S.C. § 104(a)(2) (gross income does not include "the amount of any damages (other than punitive damages) received (*whether by suit or agreement* . . .) on account of personal physical injuries or physical sickness") (emphasis added).

It is possible that the amount received by counsel through settlement of a Title VII (or other statutory fee) claim would be greater than what a court might award; it also might be less. But these vagaries are true of all aspects of a settlement, including the sum recovered by the plaintiff. If in a particular

case the IRS believed that the amount received by counsel through settlement materially exceeded any possible court award of fees—and if the Service further believed that the increment should be seen as income to the plaintiff—then the amount allocated to fees could be challenged. The IRS often challenges such taxpayer characterizations; indeed, it was successful in *Banks* itself in contesting the plaintiff's effort to characterize his settlement recovery as "personal injury damages" rather than lost wages. 345 F.3d at 381-82.[7]

Had the plaintiff in *Banks* received $314,000 from a jury verdict, followed by a fee award of $150,000, the fees would not properly be seen as income to the taxpayer. The tax treatment is not affected by the fortuity that these amounts were recovered through settlement.

Amici understand that the taxpayer in *Banks* did not advance below the argument made here. The Court may, however, consider arguments only presented by *amici*, *Teague v. Lane*, 489 U.S. at 300; *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961), and the judgment of the court of appeals in *Banks* can be affirmed on the ground that statutory fees are not included in the plaintiff's income.

II. ORDINARY CONTINGENT FEES ARE NOT INCOME TO THE PLAINTIFF

The first issue in this case—whether fees received by counsel represent income to the plaintiff in statutory fee cases—is not a close question. They do not. The result is the same for the remaining issue—whether fees received by

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[7] Any IRS challenge to the amount allocated to attorneys' fees in a Title VII settlement would make sense only in a tax regime in which (1) fees received by counsel under fee shifting statutes are *not* deemed income to the plaintiff, but (2) fees received by counsel in ordinary contingent fee litigation *are* treated as the plaintiff's income. As is shown below, however, fees received by counsel in ordinary contingent fee cases should not be considered income to the plaintiff, albeit for different reasons than in the statutory fee context.

counsel in ordinary contingent fee litigation should be deemed the plaintiff's income—although the analysis differs. Attorneys' fees are not income to the plaintiff in either situation.

A. The Split in the Circuits

The courts of appeals have divided over the treatment of counsel fees in the ordinary, non-fee shifting context. Five circuits agree with the IRS and see fees as income to the plaintiff, on an assignment of income rationale. *Raymond v. United States*, 355 F.3d 107 (2d Cir. 2004), *petition for cert. pending*, No. 03-1415; *Young v. Commissioner*, 240 F.3d 369, 376-79 (4th Cir. 2001); *Kenseth v. Commissioner*, 259 F.3d 881 (7th Cir. 2001); *Hukkanen-Campbell v. Commissioner*, 274 F.3d 1312 (10th Cir. 2001), *cert. denied*, 535 U.S. 1056 (2002); *Baylin v. United States*, 43 F.3d 1451, 1454-55 (Fed. Cir. 1995).

Three other circuits have rejected the IRS position and have held that the portion of a judgment due counsel as a contingent fee is not income to the plaintiff. *Cotnam v. Commissioner*, *supra*; *Srivastava v. Commissioner*, 220 F.3d 353, 364-65 (5th Cir. 2000); *Estate of Clarks v. United States*, 202 F.3d 854 (6th Cir. 2000); *Banks*, *supra* (6th Cir. 2003); *Davis v. Commissioner*, 210 F.3d 1346 (11th Cir. 2000) (*per curiam*); *Foster v. United States*, 249 F.3d 1275, 1279-80 (11th Cir. 2001). The Fifth and Eleventh Circuit stress that counsel was entitled under state law to an ironclad lien on his share of the proceeds, while the Sixth has moved from a primary focus on state lien law in *Estate of Clarks* to a more universal approach in *Banks* that likens the contingent fee arrangement to a joint venture in which the lawyer has a percentage interest.

The Ninth Circuit has conflicting decisions, depending in part on its reading of lien law in different states. *Compare Banaitis*, *supra* (9th Cir. 2003) (fees received by counsel are

not income to the plaintiff), *with* cases reaching the opposite result: *Benci-Woodward v. Commissioner*, 219 F.3d 941, 944 (9th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Coady v. Commissioner*, 213 F.3d 1187 (9th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001); *Sinyard v. Commissioner*, *supra*.

B. The Dispositive Nature of the Joint Venture Analogy

As noted, *Banks* analogized a contingent fee agreement to a joint venture. A joint venture is a type of partnership for tax purposes, 26 U.S.C. § 761(a), and partners realize income only on their "[d]istributive share of partnership gross income." 26 U.S.C. § 61(a)(13); *see* 26 U.S.C. § 702. Hence, if a contingent fee arrangement is seen as akin to a joint venture, the plaintiff will realize income only on her share of the court award (or settlement); in particular, fees received by counsel will not be deemed income to the plaintiff.

Also in *Banks*, the court eschewed reliance on state lien law, saying that, "[g]iven the various distinctions among attorney's lien laws among the fifty states . . . a 'state-by-state' approach would not provide reliable precedent . . . or provide sufficient notice to taxpayers as to [the] tax treatment of contingency-based attorneys fees paid from their respective jury awards." 345 F.3d at 385. Under a global approach, the issue is whether an ordinary contingent fee relationship is more like an assignment of income or a joint venture. If the former, the lawyer's share is properly treated as income to the plaintiff. But if the relationship is more like a joint venture, the share received by counsel is only counsel's income—not the plaintiff's. In fact, the essential attributes of a joint venture are present in the contingent fee relationship.[8]

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[8] If it is thought preferable to address the tax consequences of contingent fee agreements on a "state-by-state" basis, *amici* believe that the Ninth Circuit in *Banaitis* properly analyzed the tax treatment that flows from Oregon lien law.

1. *Kenseth*

Judge Posner's opinion in *Kenseth*, *supra*, is the best articulation of the assignment of income perspective on contingent fee agreements, so the decision warrants careful examination. *Kenseth* first describes the tax problem faced by the taxpayer, which was aggravated but not entirely caused by the AMT. 259 F.3d at 882. The decision then notes that "[t]he circuits are split on whether a contingent fee is, as the Tax Court held in this case, a part of the client's taxable income," *id.* at 883 The opinion agreed with the Tax Court, *id.*, reasoning that a contingent-fee lawyer's share of a recovery should be seen as a business expense for the plaintiff. *Id.* It is simply unfortunate if the tax code does not permit full (or any) deduction of this expense. *Id.*[9]

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[9] Judge Posner notes at the outset of *Kenseth* that the taxpayer's underlying case dealt with age discrimination. 259 F.3d at 882. The Age Discrimination in Employment Act provides for statutory attorneys' fees, *see* 29 U.S.C. § 626(b) (incorporating among other things the fee shifting provisions in 29 U.S.C. § 216(b)), but *Kenseth* does not address the singularities of statutory fee litigation and instead assumes that it is dealing with an ordinary contingent fee case.

Only three of the other circuit decisions cited above arose under laws permitting fee shifting—*Banks* itself, *Hukkanen-Campbell* (Title VII), and *Sinyard* (ADEA). As in *Banks* (and *Kenseth*), the Tenth Circuit in *Hukkanen-Campbell* did not acknowledge that statutory fees were in the picture. The Ninth Circuit in *Sinyard* undertook a cursory examination of this issue. After saying that, "[i]f A owes B a debt, and C pays the debt on A's behalf, it is elementary that C's payment is income to A as well as to B," 268 F.3d at 758, the majority simply observed that fee awards are formally bestowed on the plaintiff, not counsel, *id.* at 759, *citing Evans v. Jeff D.* and *Venegas v. Mitchell*. As the dissent noted, though, *Jeff D.* and *Venegas* "were decided in a different context—namely, client control over the resolution of a case." *Id.* at 761 n.2. The dissent properly concluded that, "[h]ere, defendant C does not satisfy a debt on behalf of plaintiff A; rather, C satisfies its own statutory obligation, imposed by the ADEA." *Id.* at 762.

In *Kenseth*, the taxpayer's underlying claim arose in Wisconsin and, relying on Wisconsin lien law, he argued that the lawyer was a co-owner of the underlying claim. Were that true, the lawyer's share of a recovery would merely be her entitlement as co-owner; it would not be the plaintiff's business expense. But *Kenseth* quickly disposed of any argument about co-ownership grounded on Wisconsin lien law. *Id.* at 884.

In the end, *Kenseth* concluded that "what [the taxpayer] really is asking us to do is to assign a portion of *his income* to the law firm." *Id.* (emphasis in original). And that does not work: "an assignment of income . . . by a taxpayer is ineffective to shift his tax liability." *Id.*, *citing Lucas v. Earl*, 281 U.S. at 114-15.

2. *The Economic Realities*

The Solicitor General, who addresses only the ordinary contingent fee situation, acknowledges that the ultimate tax question is one of reasonableness—whether it is "reasonable to treat the entire award[] as gross income" to the plaintiff. Brief for Petitioner at 13. Reasonableness, in turn, is a function of the practical realities of a situation. And despite its holding, *Kenseth* helps to reveal the economic reality that a contingent fee arrangement is a joint venture for tax purposes. As the decision rightly says, though, this has nothing to do with state lien law.

Rather, as Judge Posner acknowledged in *Kenseth*, "there is a sense in which contingent compensation constitutes the recipient a kind of joint venturer of the payor." 259 F.3d at 883. He elaborated on this point in his book, *Economic Analysis of Law*, saying a contingent fee agreement is a "situation of joint ownership," because "a contingent fee contract makes the lawyer in effect a cotenant of the property represented by the plaintiff's claim." *Id.* at 625 (parentheses omitted).

Consider a tract of land which, undeveloped, has a low value. The owner of the land enters into an agreement with a developer, in which the developer agrees to improve the land by putting in roads and a sewage system and building houses, and in which the parties agree to apportion income from the developed land on a 60-40 basis, with the developer entitled to 40 percent. In this joint venture, the parties (the land owner and the developer) realize income only on their respective "distributive share[s]" of the gross income from the developed land. *See* 26 U.S.C. §§ 61(a)(13), 761(a).

Now, assume that a salesperson is hired to sell the houses on a commission basis, *i.e.*, a percentage of the sales price of each house. As *Kenseth* correctly says, "the sales income [the salesperson] generates is income to the [owner/developer] and his commissions are a deductible expense, even though they were contingent on his making sales." 259 F.3d at 883.

The examples of the developer and salesperson show that a contingent compensation arrangement, by itself, is insufficient to indicate whether the compensation received is properly considered a business expense of the owner—and hence part of the owner's income. But if the contingent nature of compensation does not explain the difference in tax treatment as between the developer and the salesperson, then what is the explanation? The Sixth Circuit in *Banks*, harkening back to the language of *Lucas v. Earl* and *Helvering v. Horst*, says that—with respect to the developer—the landowner "transferred some of the trees from the orchard, rather than simply transferring some of the orchard's fruit." 345 F.3d at 386.

The metaphor used in *Banks* is not particularly illuminating. Instead, one salient difference between the developer and the salesperson is that the developer took significant steps to enhance the value of the property. In contrast, the salesperson simply sold pieces of the land; he did nothing to

increase its value. The developer creates wealth; the salesperson does not.

3. *The Contingent Fee Lawyer as Joint Venturer*

A contingent fee lawyer is like the developer in the examples above. The lawyer's task is to enhance the value of property—to take an undeveloped claim and to improve it, so that a jury will place a fully compensatory value on it.

Of course, a landowner can hire a developer at a fixed rate and finance the development himself, rather than entering into a joint venture agreement. If so, the compensation paid to the developer is properly seen as a business expense of the owner. But if for economic reasons—*e.g.*, a lack of money to finance development—the owner elects to make the developer a joint venturer, then the developer assumes part of the risk. And if this happens, the compensation ultimately received by the developer (assuming the enterprise is successful) is not the landowner's business expense. Under the Tax Code, it is income solely to the developer. 26 U.S.C. § 61(a)(13).

In the same way, the holder of a legal claim may retain a lawyer on an hourly basis. If this occurs, the compensation received by the lawyer is properly seen as the claimholder's expense. But if the claimholder lacks the money to finance litigation and desires to share the risk, she may enter into a contingent fee agreement with counsel. If so, the compensation ultimately received by counsel (if the lawsuit is successful) is not the claimholder's business expense and is income solely to counsel.

A developer retained at a fixed rate, like a lawyer retained on an hourly basis, may engage in wealth creation by improving property. But only the developer as joint venturer, and the contingent fee lawyer, *both* (1) create wealth, and (2) assume risk. One who both enhances the value of property, and who assumes the risk that the property may not be

profitable, is in the same economic position as the owner of the property, whether or not a formal co-tenancy relationship exists. Tax law should recognize the economic reality that a lawyer retained on a contingent basis is "in effect a cotenant of the property represented by the plaintiff's claim." *Economic Analysis of Law*, *supra*, at 625.[10]

On the one hand, a contingent fee agreement shares the essential attributes of a joint venture—wealth creation and assumption of risk. On the other, there are important differences between contingent fee arrangements and the devices that have been seen as mere assignments of income. For example, contingent fee agreements are animated not by tax avoidance purpose but rather by economic motive. *See Economic Analysis of Law* at 624. And application of the assignment of income doctrine to the contingent fee setting results in double taxation; *i.e.*, counsel's fee is treated as income to both counsel and the plaintiff. Double taxation is not unprecedented, but it is inefficient economically and should not be indulged without the type of clear signal from Congress that is lacking here. *See Banks*, 345 F.3d at 385-86.

Ordinary contingent fee agreements are much closer to joint ventures than to the schemes interdicted by the assignment of income doctrine. Attorneys' fees received by contingent fee counsel should not be treated as income to the plaintiff.

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[10] *Kenseth* notes that fees paid to a lawyer retained on an hourly basis are treated as the plaintiff's expense and says, "[w]e cannot see what difference" a contingent fee arrangement makes. 259 F.3d at 883. The difference is counsel's assumption of risk, which leads to a fundamental lack of symmetry: the hourly lawyer is entitled to payment for his services even if he loses. But if the contingent fee lawyer loses, she is not entitled to payment, and she cannot take a business loss deduction in connection with her unreimbursed services.

CONCLUSION

A judicial award of attorneys' fees under a fee shifting statute is manifestly not income to the plaintiff. The same is true of fees recovered as part of a settlement of a claim subject to fee shifting. The judgment of the Sixth Circuit in *Banks* can be affirmed on this ground alone.

In addition, fees received by counsel in all contingent fee cases, even those that do not arise under fee shifting statutes, should not be deemed income to the plaintiff, either, because contingent fee agreements are materially the same as joint ventures. The judgments in both *Banks* and *Banaitis* can be affirmed on this ground.

The judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been victims of wrongful termination and unlawful employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA's members represent clients under all the fee shifting statutes set forth in the Statement of Interest.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional and statutory rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades LDF attorneys have represented parties in litigation before this Court and the lower federal courts involving race discrimination, specifically including race discrimination in employment. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Bazemore v. Friday*, 478 U.S. 385 (1986); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). LDF also represented the successful plaintiff in the case that established the basic standard for awarding fees under federal fee-shifting statutes, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), and it has frequently appeared before this Court as *amicus curiae* in matters involving the construction of federal civil rights laws.

AARP is a nonpartisan, nonprofit membership organization of more than 35 million people aged 50 or older dedicated to

addressing the needs and interests of older Americans. AARP supports and defends the rights of older Americans and the laws and public policies designed to protect them. Approximately one half of AARP's members remain active in the work force and are protected by one or more federal fee-shifting statutes, including, *inter alia*, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. Moreover, other types of litigation that involve contingent fee arrangements, including that conducted pursuant to federal and state consumer protection statutes, can be an effective mechanism to enforce the rights of older Americans involving a broad range of issues. Treating attorneys' fees, whether awarded under fee-shifting statutes or obtained pursuant to a contingency agreement, as taxable income to prevailing plaintiffs would be counterproductive to the remedial purposes of litigation. Additionally, contrary to the interests of the parties, such tax treatment would act as a disincentive to settlements and, consequently, unnecessarily burden court systems. AARP, therefore, opposes treating attorneys' fees as taxable income to prevailing plaintiffs and urges the Court to affirm the decisions below.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to using trial lawyers' skills and approaches to create a more just society. Through precedent-setting litigation, TLPJ prosecutes cases throughout the country designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, workers' rights, America's civil justice system, and the protection of the poor and powerless. TLPJ is committed to preserving an accessible system of justice in this country and appears as *amicus curiae* in this case because the treatment of attorneys' fees as taxable income to the client could further diminish access to the courts for those who need legal representation to enforce their rights but who cannot afford to pay competent counsel on their own.

Public Advocates, Inc., one of the oldest public interest law firms in the nation, was founded in 1971 to challenge the persistent, underlying causes and effects of poverty and discrimination and to work for the empowerment of the poor and people of color by raising a voice for social justice in government, corporate and other institutions. Public Advocates was instrumental in the recognition of the "private attorney general" doctrine in *Serrano v. Priest*, 20 Cal.3d 25 (1977), and statutory attorneys' fees continue to play an important role in enabling Public Advocates to represent poor communities and individuals today.

The Western Center on Law and Poverty is the oldest and largest state support center for California's legal services program serving the poor. The Western Center, which no longer receives federal funding, depends on court-awarded statutory attorneys' fees. In most of the Center's cases, the clients do not receive a monetary reward. The possibility that the Center's indigent clients nonetheless could owe substantial sums of money in taxes would certainly deter litigation on their behalf.